BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAUNDRA WELLS	)	
Claimant	)	
	)	
VS.	)	
	)	
KELLY SERVICES, INC.	)	
Respondent	)	Docket No. 1,065,581
	)	
AND	)	
	)	
INDEMNITY INS. CO. OF N. AMERICA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 30, 2013, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Kim R. Martens of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant suffered an injury while walking to her assigned duties; therefore, claimant was denied benefits under K.S.A. 2012 Supp. 44-508(f)(3)(B), also known as the "going and coming" rule.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 30, 2013, Preliminary Hearing and the exhibits; the July 15, 2013, transcript of the discovery deposition of claimant; and the July 24, 2013, transcript of the evidentiary deposition of German Enriquez, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues she was in the course and scope of her employment at the time of her injury. Claimant maintains travel is an inherent part of her employment because she goes to work where and when she is directed and as dispatched, subject to respondent's control and direction, for temporary periods of time. Further, respondent benefitted from the travel of its employees to the assigned client.

Respondent contends the ALJ's Order should be affirmed as claimant's injury falls within the "going and coming" rule, and therefore did not arise out of and in the course of her employment. Further, respondent argues claimant's injury was the result of a non-compensable neutral risk and the result of an activity of daily living.

The sole issue for the Board's review is: Did claimant's injury arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Respondent is a temporary employment placement agency. Claimant began employment with respondent on November 12, 2012. Claimant was placed primarily in clerical positions when assigned temporary placement with respondent's clients. The nature of her position also required claimant to travel to various locations, though she indicated to respondent she was unwilling to travel over 20 miles to an assignment. Respondent did not provide transportation for its employees but rather informed its employees some form of reliable transportation was required. Claimant stated it was her understanding she must drive her own vehicle to assignments.

On April 15, 2013, claimant was assigned by respondent to report to Ray Hodge & Associates, a firm in Wichita, Kansas, to participate in a focus group. Claimant testified she was not paid for her time nor mileage to travel to and from Ray Hodge & Associates' office. Her paid time was to begin upon her arrival and commencement of the focus group work tasks.

Claimant did not report at respondent's office before her work was to begin at Ray Hodge & Associates that day, as this was neither required nor common practice. Instead, claimant traveled directly to the Market Center parking garage, located a relatively short distance from Ray Hodge & Associates. She was informed by a coworker at respondent that if she chose to utilize the parking garage, as parking in that area of Wichita could be difficult to obtain, she would be reimbursed the cost of parking for the day. Claimant testified she was under no obligation to use the parking garage. Market Center parking garage was not exclusively controlled, maintained, or owned by either respondent or Ray Hodge & Associates.

Claimant parked her vehicle on the third floor of the Market Center parking garage at approximately 8:40 a.m. on April 15, 2013, on her way to report for focus group tasks at 9:00 a.m. She took the elevator to the first floor of the garage. Claimant walked toward the driveway entrance of the garage from the elevator, intending to exit onto the street. Claimant testified the ground appeared level and that she did not see a drop of approximately four to six inches between the raised walking area and the lower drive area. As she stepped from the walking area onto the driveway area of the garage, claimant fell forward and landed on her right side. She explained it felt as if she had stepped into "thin

air."[1] Claimant stated she did not recall if the garage had its own lighting. It was fairly dark coming out of the elevator, and she was looking to the outdoor daylight as she walked.[2]

Claimant testified she heard and felt a pop in the upper part of her right leg when she fell. She remained on the ground for approximately 20 minutes before an ambulance arrived to transport her to Via Christi hospital. Claimant never reported for work at Ray Hodge & Associates and therefore was not paid by respondent.

Claimant arrived at the hospital with a fractured right femur. Claimant was admitted to the hospital and underwent surgery with Dr. Bradley Dart, an orthopedic surgeon, on April 18, 2013. A sideplate and screws were inserted into claimant's leg. Claimant was released to St. Teresa Rehab Center the following week, where she underwent physical therapy. Claimant was prescribed pain medication and the use of a wheelchair and walker. She was taken off work.

Claimant testified she has been non-weight-bearing, or toe-touch weight-bearing, since the date of her accident. She utilizes a walker when she is not using a wheelchair. She continues to receive follow up treatment with Dr. Dart. Claimant remains off work with the understanding she may be able to return to work in August 2013.

PRINCIPLES OF LAW

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[4]

K.S.A. 2012 Supp. 44-508(f)(3)(A) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

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[1] P.H. Trans. at 15.

[2] *Id*. at 18.

[3] K.S.A. 2012 Supp. 44-501b(c).

[4] K.S.A. 2012 Supp. 44-508(h).

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2012 Supp. 44-508(f)(3)(B) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

Generally, if an employee is injured while on his or her way to assume the duties of employment or after leaving such employment, the injuries are not considered to have arisen out of and in the course of employment under K.S.A. 2012 Supp. 44–508(f). This rule is known as the "going and coming" rule.[7] The rationale for the "going and coming"

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2012 Supp. 44-555c(k).

[7] See *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d 962, 894 P.2d 901, *aff'd* 258 Kan. 653, 907 P.2d 828 (1995).

rule was explained in *Thompson v. Law Offices of Alan Joseph*:[8] "[W]hile on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment. [Citations omitted.]" "'[T]he question of whether the "going and coming" rule applies must be addressed on a case-by-case basis.' [Citation omitted.]"[9]

K.S.A. 2012 Supp. 44-508(f) is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[10]

However, in addition to the specific language contained in K.S.A. 2012 Supp. 44-508(f), Kansas courts have long recognized an exception to the "going and coming" rule where travel is an intrinsic part of the employee's job.[11] Our Supreme Court noted that when travel becomes an intrinsic part of the job it is an element of employment.[12] The Court of Appeals provides an excellent explanation of the inherent travel exception in *Williams v. Petromark Drilling, LLC*:[13]

> While caselaw deems inherent travel an exception to the going-and-coming rule, "it appears the analysis is really whether travel has become a required part of the job such that the employee actually assumes the duties of employment from the moment he or she leaves the house and continues to fulfill the duties of employment until he or she arrives home at the end of the workday." *Craig*, 47 Kan. App. 2d 164, 168-69, 274 P.3d 650 (rejecting argument that judicially created inherent-travel exception to K.S.A. 44-508(f) not viable after *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009), because it contradicts clear statutory language); *Quintana*, 2012 WL 1759430, at *6-7 (same; noting Kansas Supreme Court has not departed from any cases recognizing inherent-travel exception since *Bergstrom*).

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[8] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[9] *Chapman v. Beech Aircraft Corp.,* 20 Kan. App. 2d at 964; see *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, Syl. ¶ 3.

[10] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

[11] *Scott v. Hughes*, 294 Kan. 403, 414, 275 P.3d 890, citing, *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006); *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 277, 899 P.2d 1058 (1995).

[12] *Sumner v. Meier's Ready Mix, Inc*., 282 Kan. 283, 289, 144 P.3d 668 (2006).

[13] *Williams v. Petromark Drilling, LLC*, 108,125, 2013 WL 2450535 (Kansas Court of Appeals unpublished opinion dated June 7, 2013), petition for review filed July 8, 2013.

The facts of this case do not support the conclusion that the inherent travel exception applies. Other than needing a vehicle to get to work, which applies to most workers, travel was not a required part of claimant's job, such that the employee actually assumes the duties of employment from the moment he or she leaves the house and continues to fulfill the duties of employment until he or she arrives home at the end of the workday.

CONCLUSION

Claimant's injury did not arise out of and in the course of her employment with respondent pursuant to K.S.A. 2012 Supp. 44-508(f)(3)(B).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated July 30, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2013.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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John D. Clark, Administrative Law Judge